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LAWRENCE R. TARLTON, PETITIONER

v.

MELVIN R. LAIRD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1448

LAWRENCE R. FAULKNER, PETITIONER

v.

MELVIN R. LAIRD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENTS

Petitioner, who was classified II-A (occupational deferment), entered his second year of graduate study in September 1967, and sought reinstatement to his previous classification of II-S (student deferment) (Pet. 3-4). On October 24, 1967, he was declared delinquent by his local Selective Service board for failing to have his Registration Certificate in his personal possession as required by 32 C.F.R. 1617.1 (Pet. 4).[1] He was reclassified I-A the same day (*ibid.*).

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[1] Petitioner turned in his draft card as a protest against the war in Vietnam.

On August 12, 1968, petitioner brought this pre-induction suit to overturn his I-A classification and enjoin his impending induction (Pet. 4). On September 9, 1968, the district court issued a preliminary injunction (289 F. Supp. 895) (Pet. 5). Respondents took a direct appeal to this Court, which was withdrawn subsequent to this Court's decisions in *Oestereich* v. *Selective Service Local Bd. No. 11*, 393 U.S. 233, and *Clark* v. *Gabriel*, 393 U.S. 256, so as to permit reconsideration of the case by the district court in light of those decisions (see 393 U.S. 1046). Thereafter, the Court of Appeals for the Second Circuit decided the similar case of *Breen* v. *Selective Service Local Board No. 16*, 406 F. 2d 636.[2] On April 9, 1969, the district court, relying on *Breen*, vacated the preliminary injunction and dismissed the complaint (Pet. 10-11). The court of appeals affirmed, but stayed petitioner's induction on the condition that he file a petition for a writ of certiorari prior to May 31, 1969 (Pet. 9).

Petitioner maintains that Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. III) 460 (b)(3)) should be construed, as in *Oestereich*, so as not to prohibit pre-induction judicial review of a delinquency reclassification in circumstances such as those presented here. He also asserts that his reclassification and ordered induction were punitive in nature, and in violation, *inter alia*, of the First and Fifth Amendment. Accordingly, the instant case presents substantially the

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[2] On April 28, 1969, this Court granted certiorari in the *Breen* case (No. 1144, 1968 Term).

same questions as are involved in *Breen*. Since the court below relied entirely upon *Breen* in affirming, and since certiorari has been granted by this Court in that case, it would seem appropriate to defer consideration of this petition until after *Breen* has been decided.

Respectfully submitted.

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